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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 986

STERLING ALUMINUM PRODUCTS, INC.,
Petitioner,

vs.

SHELL OIL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit.

Harris J. Levin
WAYNE C. SMITH, JR.,
Attorney for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

Petitioner, Sterling Aluminum Products, Inc., a corporation, prays that a writ of certiorari be issued to review the judgment (R. 121) of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on February 21, 1944, in a cause entitled "Sterling Aluminum Products, Inc., Appellant, versus Shell Oil Company, Appellee," designated in that court as No. 12,694, civil.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, upon which its judgment was based, is reported in 140 F. (2) 801 and is set out in the record (R. 121).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 [28 U. S. C., No. 347 (a)], subject to the rules promulgated by this Court on February 27, 1939, and amendments thereto.

The judgment of which review is sought was entered on February 21, 1944 (R. 121), but did not become final until March 27, 1944, when petitioner's (appellant's) petition for rehearing was denied (R. 148).

QUESTION INVOLVED.

Appellant contends that the decision of the United States Circuit Court of Appeals (R. 121) is contrary to the local applicable law as expressed by the Supreme Court of Missouri, and that grave error will be made if certiorari is not granted and the uniformity of the decisions in Missouri, and national uniformity of the law maintained.

QUESTION PRESENTED.

Is the test and law applied by the United States Circuit Court of Appeals, namely, that the petitioner's cause of action is predicated upon the death of one of its employees and hence is not maintainable as an action for breach of warranty erroneous as in conflict with applicable local decisions?

STATEMENT.

Petitioner is a corporation organized under the laws of Missouri, engaged in the manufacture of aluminum pistons and the rebuilding of automobile motor blocks. The disputed evidence, which is properly determinable by the jury, reveals that the petitioner claims the appellee warranted to it that a certain solvent manufactured by appellee was nonexplosive and in all manner safe for the known use to which the petitioner intended to make of the solvent. This the appellee denies. At the close of the evidence defendant requested an instructed verdict in its favor (R. 90), and, among other grounds, number 6 was, "That under the law of Missouri damages because of a death cannot be recovered in an action for breach of contract." Ruling on this particular question was reserved by the District Court, and the jury was instructed (R. 93) and exception thereto taken by petitioner (R. 98). The jury returned a verdict in favor of the defendant (R. 99), and petitioner thereafter filed a motion for new trial (R. 113), which was overruled by the District Court (R. 114). Petitioner then appealed to the Circuit Court of Appeals for the Eighth Circuit, and that Court in its opinion (R. 121) held that the instruction objected to by petitioner was erroneous, but that the appellee should have had a directed verdict in its favor because, as a matter of law, petitioner was not entitled to maintain this action. Therefore, we deem it unnecessary to review any of the evidence regarding the disputed facts, or the question of the District Court's instruction, and will confine ourselves to the theory of our case, and the reasons it can be maintained. On or about May 9, 1940, one of petitioner's employees was injured during the course of his employment, said injury causing his death. The injury and death were caused by the use of the solvent of defendant, in a manner in which the defendant had warranted to petitioner as being impos-

sible. Petitioner, as the result of the injury and death, paid to dependents of deceased the sum of four thousand dollars ($4,000.00). There is no dispute that the petitioner was liable for these payments under the provisions of the Missouri Workmen's Compensation Law. It is our contention that we are entitled to recover the amount paid to the dependents of deceased in an action for breach of warranty. The United States Circuit Court of Appeals for the Eighth Circuit in its decision (R. 121, 127) states as follows:

> "Plaintiff is seeking to recover damages predicated on the death of its employee. Under Missouri law, damages for death are not recoverable as a breach of contract, but only as a tort. The Supreme Court has specifically so ruled in Bloss v. Dr. C. R. Woodson Sanitarium Co., 319 Mo. 1061, 5 S. W. (2d) 367, 368. In that case, where the death was alleged to have been occasioned by a breach of contract and a demurrer had been sustained to the petition, the court, in affirming the judgment for defendant, stated that 'the doctrine in this state always has been that the wrongful death statutes confer a cause of action ex delicto, not one ex contractu.' However unfortunate this statutory construction may seem, we have no power to change it or right to ignore it."

Further in the opinion of the Circuit Court of Appeals (R. 127, 128) we find the following:

> "But the Workmen's Compensation Law merely fixed the scope and measure of plaintiff's liability for its employee's death. Plaintiff's liability was for the death, and the damages sought to be recovered here are therefore clearly predicated on the death and have been occasioned by it. In this connection, it should be noted that the Missouri Workmen's Compensation Law does not grant any right of recoupment to an employer against a third party, for compensation payments made on account of an employee's death, except under the

provisions of the general death statutes, and the Bloss case clearly settles that these statutes do not permit the assertion of damages for death as a breach of contract."

Petitioner contends that this is a misapplication of local law, a refusal to recognize the decisions of the Supreme Court of Missouri as they deal with the law of warranty, and an extension of the Bloss case far beyond the meaning of the decision when the facts of the Bloss case are reviewed and the subsequent passage of our Workmen's Compensation Law is considered.

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

(1) In refusing to apply the applicable law of Missouri to the facts of this case.

(2) In holding that the decision in the Bloss case (R. 127) is controlling of this case.

REASONS FOR GRANTING THE WRIT.

(1) **The Circuit Court of Appeals has erred in refusing to apply the applicable law of Missouri to the facts of this case.**

The defense forwarded by the defendant in this case is exactly the same as that advanced in the case of London Guarantee and Accident Co., Limited, of London, England, v. Strait Scale Co., 15 S. W. (2) 766, 322 Mo. 502, 64 A. L. R. 936. It may be conceded that at common law there was no cause of action for death. It may also be conceded that there must be an enabling act in order for a certain limited class of heirs and dependents to maintain an action for death, and that prior to 1926 the Wrongful Death Statute in Missouri, R. S. Mo. 1939, Sections 3652

et seq., was the only such enabling act in Missouri. However, in 1926 the Missouri Workmen's Compensation Act was passed, Chapter 29, R. S. Mo. 1939, Sec. 3689 et seq., setting forth a separate and distinct cause of action for death due to accidental injury arising out of and in the course of the employment, but that law determines only the rights as between employer and employee or the dependents of the employee. The court below has failed to recognize one of the fundamental issues in this case when it says that the Compensation Law provides no means of recoupment in behalf of the employer except as set forth in the section subrogating the employer **to the rights of the employee** or dependents of the deceased (R. S. Mo. 1939, Section 3699). The very terms of that section of the law provides for and preserves to the employee the right to sue at common law a third party whose negligence is responsible for the injury, and provides a means whereby the employer may recover whatever amounts he has paid because of his liability under the Compensation Law. We have never, and do not now, contend that the dependents of our employee had any cause of action against Shell Oil Company for negligence. We do not contend that the Compensation Act sets forth any procedure allowing us to sue Shell Oil Company. We do contend that the Compensation Act rendered us liable to the dependents of our employee, and that liability was separate and distinct from any we may have had at common law or under the Wrongful Death Statute. The courts of Missouri, in the case of State ex rel. National Lead Co. v. Smith, Judge, 134 S. W. (2d) 1061, 1065, state as follows:

> "The Workmen's Compensation Act is a complete code governing all questions of substantive rights under its terms; and in cases cognizable before the Commission its jurisdiction is exclusive; it is not cumulative to or supplemental of common law, but is wholly substitutional; it is contractual and an integral

part of the employment contract. These expressions have become axiomatic by repetition in opinions of the appellate courts."

There can be no doubt that a new and distinct liability had been imposed upon petitioner, and the fact that that law sets forth no means of recoupment by the employer can have no controlling effect on this suit. This is a suit for breach of warranty, and governed by the law of warranty. Getting back to our statement that the defense in the instant case is the same as that interposed in the London Guarantee case, we find that the defendant there pleaded that contributory negligence was a defense. Now, it has always been fundamental in law that a person cannot recover for his own negligence or if his negligence is a contributing factor to his injury. This is exactly the same as saying we cannot recover because we have paid damages predicated on the death of our employee. Both are intended as absolute defenses. The Supreme Court of Missouri, in the London Guarantee case, deals with the above subject, and lays down this rule, 15 S. W. (2), l. c. 769:

"It is very doubtful therefore whether they were joint tort feasors in any proper sense. **The question of whether they were or not, it seems to us, is without relevance.** This is an action growing out of a breach of contract and not for contribution in tort. The real question is whether the damages sued for were proximately caused by defendant's breach of contract, or by the construction company's subsequent tort. And that question is not to be solved according to abstract principles of the law of negligence relating to proximate cause, but from the standpoint of contract; this is a suit for breach of contract."

This naturally leads to the query: What is the law of contracts and warranty? We deem it unnecessary to quote lengthy opinions and many citations, and will consider

only one other case in determining the law of contracts. The Missouri Supreme Court, in the case of Mark et al. v. H. D. Williams Cooperage Company, 103 S. W. 20, quotes the leading English case of Hadley v. Baxendale, 9 Ex. 341, 26 Eng. L. and Eq. 398, and sets forth this rule at page 26 of 103 S. W.:

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." * * *
>
> "* * *. If, therefore, I sell pipe to my neighbor under an implied warranty that it is fit for use to supply steam heat for drying kilns in a cooperage plant, and my neighbor, relying on the warranty and knowing nothing of the unfitness of the pipe, i. e., without negligence on his part, applies it to such use, and damages to his staves, cooperage stuff, and otherwise from such use, I am liable for such consequential damages, because they were fairly within the contemplation of my neighbor and myself when the contract was made."

Again referring to the London Guarantee Case, we find this statement at page 769 of 15 S. W. (2d):

> "But from the facts already stated it is plain that both defendant and the construction company knew the uses to which the lever beam was to be put, the stress and strain to which it would be subjected; that if it broke, owing to a hidden structural defect, the scale and hopper would fall upon the engine or operating house of the coaling station; **that injury to persons and property would thereby likely ensue; and that under the law the construction company would be re-**

quired to respond in damages therefor. Such consequential damages, it may therefore reasonably be supposed, were in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. It follows they are recoverable."

The Circuit Court of Appeals, in its opinion, completely disregards this rule of law, and says the London Guarantee case is controlled by the Wrongful Death Statute of Minnesota (R. 128). A reading of this case reveals no reference to tort law or to statutes of Minnesota. Had the London Guarantee case been a suit between dependents of deceased and the scale company, defendant, then the Minnesota Wrongful Death Statute might be involved, and the question of recovery for death by a contract action involved. That is not the case, and the court below can only give effect to the decisions of Missouri, which rule is that a buyer may recover from a seller in an action for breach of warranty all damages **imposed by law upon the buyer to third persons**, when those damages have been caused by the breach of warranty and those damages were fairly within the contemplation of the parties at the time of the making of the contract. The question of consequential damages, it seems, is a jury question, with proper instruction by the trial court.

The only law that the court below had any right to give effect to is the holdings of the Missouri Supreme Court and its rules of law respecting warranty and consequential damages. In giving effect to those decisions, the Court can only go outside those decisions to determine if there was **any liability imposed by law** upon the petitioner for damages to third persons. Under the Missouri Workmen's Compensation Law the liability of the petitioner to the dependents of its deceased employee is not questioned. Under the test of recovery of consequential damages for breach of warranty, we are entitled to recover those dam-

ages if the jury believes those damages were within the contemplation of the parties when they entered into the contract.

(2) **The Court erred in holding the decision of the Bloss case controlling of the issues in this case.**

In the case of Bloss v. Dr. C. R. Woodson Sanitarium Co. et al., 319 Mo. 1061, 5 S. W. (2) 367, the Court points out that at common law there was no recovery for death. Then the Court gives two reasons why there can be no recovery. They are: First, it could not fairly be held to be within the reasonable intendment of (the) contract that the hospital agreed to pay to the wife the value of the husband's life to her in case he did commit suicide, and, second, it is settled by innumerable cases that the right to recover for the death of a human being is a right solely given by statute. From these rules the Court arrives at the conclusion that a cause of action is not one ex contractu, but is one ex delicto, and, under Missouri statute, death was actionable only in accordance with our Wrongful Death Statute. The decision of the Court is correct, but inapplicable to the issues in this case. The facts of the Bloss case are so distinct and different from the instant case that the Bloss case does not state any law applicable to our case. It is true that consequential damages are discussed by the Court, but in the Bloss case the plaintiff had sustained no damage as the result of liability imposed upon plaintiff by law, said damages being paid to some third party. The plaintiff in the Bloss case could only have recovered on a theory of tort, because at the inception of the Bloss case, and under the facts of the Bloss case, there is only one enabling statute to recover for death, that being our Wrongful Death Statute. That statute, and hence the Bloss case, have no effect upon the liability of Sterling Aluminum Products, Inc., to the dependents of its deceased employee. Under the provi-

sions of the Compensation Law we were liable for the death of our employe exclusive of the question of negligence and totally and completely exclusive of the Wrongful Death Statute. That is the beginning and the end of the effect of our Compensation Law on this case. It imposes liability for death exclusive of the Wrongful Death Statute. There is no such statute in the Bloss case, nor is there any damage imposed by law upon the plaintiff to third persons. The court below, in requiring us to find some provision in the Compensation Law allowing us to recoupment against third persons is contrary to the applicable law of contracts. As the Bloss case is so distinguishable in fact from the instant case that it can have no effect here. As regards a cause of action for death, and this applies only to petitioner and dependents of deceased employee, there can be no doubt that under the decisions previously quoted there is an entirely different standard and manner set up for the recovery for death separate and distinct from the Wrongful Death Statute. As long as there is a statute making petitioner liable for death, under the law of Missouri, this Court and the court below has no option except to apply the law of contracts in the instant case. This is not a case wherein an employee is trying to maintain a common law suit, and, therefore, rules of negligence applicable to third party cases have no bearing.

The Supreme Court of Missouri, in the case of Morse v. Consolidated Underwriters, 163 S. W. (2d) 586, 587, lays down this rule:

> "In applying cases which have been decided, what may have been said in the opinion should be confined to, and limited by, the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different."

Applying this test to the Bloss case, with the differences in fact noted, namely, that plaintiff has paid no damages to third persons imposed upon plaintiff by law, and the fact that the Bloss case is authority for the proposition that death is only recoverable by statute, and the Bloss case was not decided under the Compensation Law, there is such a material difference of fact that the Bloss case must not be considered as having any weight in the instant case.

The proper rule is stated in the cases quoted by petitioner herein, and, under the rule of contracts, once we have established petitioner's liability for death under any statute, and damages paid in accordance therewith, then the only issue before the Court is, were the damages proximately caused by the breach of warranty? If so, they are consequential damages, and recoverable under the law of Missouri.

CONCLUSION.

In view of the failure of the Circuit Court of Appeals to give effect to the law of Missouri and the importance of this decision as it affects Missouri law, and that this same problem has been decided by another Federal Circuit Court of Appeals, the case is an appropriate one for review by this Court.

Respectfully submitted,

WAYNE C. SMITH, JR.,
Attorney for Petitioner.

(13)

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S STATEMENT.

In 1935 petitioner, Sterling Aluminum Products Company, commenced using a product of respondent, Shell Petroleum Company, known as "Shell solvent, code No. 8195" for the testing of motor blocks under pressure (R. 2). In May, 1940, while one of petitioner's employes was engaged in this work, a freeze plug blew out of the motor block and shattered an electric light globe. A fire resulted, in which the employee lost his life (R. 37, 121).

Petitioner paid the employe's dependent $4,000 under the requirements of the Missouri Workmen's Compensation Act (R. S. Mo. 1939, Secs. 3689-3766) and sued to recover the loss from respondent. The suit was based upon an alleged breach of warranty, the petition alleging that respondent had warranted its product to be non-inflammable, but that on the occasion of the injury to its employe, the solvent escaped from the motor block, spread upon his clothing, and became ignited, causing his death (R. 3). The making of the alleged warranty was denied by respondent, and this issue was strongly contested at the trial, which resulted in a jury verdict for respondent.

At the close of petitioner's evidence at the trial (R. 45), and again at the close of all the evidence (R. 91), respondent moved for a directed verdict in its favor, assigning as ground therefor, among others, that under the law of Missouri damages arising from death could not be recovered in an action for breach of contract. On petitioner's appeal to the Circuit Court of Appeals the Court sustained this contention of respondent and affirmed the judgment (R. 126).

SUMMARY OF ARGUMENT.

(1)

The purpose of petitioner's suit was to reimburse itself for money paid to the dependent of its deceased employe as a result of the death of the employe. The accident and the death of the employe occurred in the State of Missouri. Petitioner's alleged right of recovery stems from and is bottomed upon the employe's death. No right of action for death is conferred by the common law, and there is no statute of Missouri giving a right of action for death based upon breach of warranty or contract, such right, under Missouri statutes and decisions, being limited to tort actions. The Circuit Court of Appeals correctly so held.

Sections 3652, 3653, Revised Statutes of Missouri 1939;
Bloss v. Dr. C. R. Woodson Sanitarium Co. et al., 319 Mo. 1061, 5 S. W. (2d) 367;
Braun v. Riel (Mo. Sup.), 40 S. W. (2d) 621, 80 A. L. R. 875.

(2)

The case of London Guarantee and Accident Co. v. Strait Scale Co., 322 Mo. 502, relied upon by petitioner, does not apply to the present case. The accident and death there involved occurred in Minnesota, where the law permits an action arising out of death to be maintained *ex contractu*. The point involved in the present case was not ruled upon or even presented to the Missouri Supreme Court in the London Guarantee case.

Section 8175, Minnesota General Statutes 1913;
Keiper v. Anderson et al., 138 Minn. 392, 165 N. W. 237, L. R. A. 1918 C, 299.

ARGUMENT.

The payment for which petitioner sought reimbursement in its suit was one it was obliged to make because of the death of its employee. The causative factor, the event which set in motion the chain of circumstances resulting in this litigation, was the death of the employe, and consequently petitioner's action stemmed from and was bottomed upon that event. The theory of the action was that, by virtue of an alleged breach of warranty, respondent was liable for the employe's death, and consequently was liable to the petitioner for the loss petitioner sustained as a result of the death. Under the common law, no action lies to recover damages arising out of the death of a human being, and it devolved upon petitioner to establish such a right under some statute of the state. Only two statutes of Missouri, Sections 3652 and 3653, Revised Statutes of Missouri 1939, create rights of action for death. Section 3652 provides:

> "Whenever any person, including any employee of the corporation, individual or individuals hereinafter referred to whose death is caused by the negligence of a coemployee thereof, shall die from any injury resulting or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car or train of cars, or any street electric or terminal car or train of cars, or of any master, pilot, engineer, agent or employee whilst running, conducting or managing any steamboat, or any of the machinery thereof, or of any driver of any stage coach, automobile, motor car or other public conveyance whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, whether the same be a steam, street, electric or terminal railroad or any part thereof, or in

any locomotive, car, street car, electric car, or terminal car, or in any steamboat, or the machinery thereof, or in any stage coach, automobile motor car, or other public conveyance, the corporation, individual or individuals in whose employe any such officer, agent, servant, employee, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns, operates or conducts any such railroad, locomotive, car, street car, electric car, terminal car, automobile motor car, stage coach, or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency, unskillfulness, negligence, or criminal intent above declared, or any such officer, agent, servant, employee, master, pilot, engineer or driver, whose negligence, unskillfulness, or criminal intent shall cause such injury, shall forfeit and pay as a penalty, for every such person, employee or passenger so dying, the sum of not less than two thousand dollars, and not exceeding ten thousand dollars, in the discretion of the jury, * * * and such corporation, individual or individuals or such officer, servant, agent, employee, master, pilot, engineer, or driver, may show as a defense that such death was caused by the negligence of the deceased. In suits instituted under this section, it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency, and that the injury received was not the result of unskillfulness, negligence or criminal intent. Every person who shall have cause of action for any death through the negligence, unskillfulness, or criminal intent of any servant, under the provisions of this section, may, at his option, bring suit thereon jointly against the master and servant, or severally, against either master or servant."

And Section 3653 provides:

"Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and

the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

Clearly section 3652 is without application to the facts of this case. Does section 3653 authorize an action of this character? That this question must be answered in the negative is conclusively established by the decision of the Missouri Supreme Court in Bloss v. Dr. C. R. Woodson Sanitarium Co. et al., 319 Mo. 1067, 5 S. W. (2d) 367. There plaintiff sought to recover damages in the amount of $20,000.00 for the death of her husband, who had suffered from a nervous malady accompanied by a suicidal tendency or mania, and while under treatment in defendants' sanitarium had hanged himself. In plaintiff's petition it was charged that the defendants contracted with her to accept custody of her husband as a patient, to provide him with living quarters and accommodations, to treat him and to guard him against the dangers incident to his disease, of which disease defendants were aware, but that defendants "in violation of their said contract with plaintiff, and contrary to the representations and promises made at the time her said husband was placed as a patient with defendants," did not guard and protect her husband, and as a result of defendants' neglect to perform their obligation the self-destruction occurred. Defendants demurred to the petition, the grounds of the demurrer being: (1) that the petition did not state a cause of action; (2) and that the action was barred by limitation. The demurrer was sustained by the trial court and plaintiff appealed. The suit was not instituted until more than a year and a half after the death of plaintiff's husband,

whereas Section 4221, R. S. Mo. 1919 (now Section 3656, R. S. Mo. 1939), requires actions for death to be commenced within one year after the accrual of the cause of action. To avoid the bar of the statute plaintiff contended the action was one ex contractu and not governed by it. Defendants' answer to that contention was that if the action was one on contract the petition did not state a good cause of action because no action for wrongful death could be maintained except under the statute (Section 4218, R. S. Mo. 1919, now Section 3653, R. S. Mo. 1939). The Supreme Court of Missouri affirmed the judgment of the lower court. We quote from the opinion:

> "Treating the action as one on contract, in harmony with appellant's construction of the pleading, we are still clearly of the opinion that the demurrer was well ruled.
>
> * * * * * * *
>
> "The contract pleaded was not one with the deceased. It was an engagement directly between the appellant and the respondents, and the point to be determined is whether she, as obligee, can maintain this suit on her contract for damages for his wrongful death.
>
> "The law is to the contrary. As was said in Bates v. Sylvester, 205 Mo. 493, 499, 104 S. W. 73, 74 (120 Am. St. Rep. 761, 12 Ann. Cas. 457):
>
> " 'At common law the death of a human being gave rise to no civil action in behalf of any person under any circumstances as has often been decided by the appellate courts of this state.'
>
> "To the same effect is Gilkeson v. Mo. Pac. R. Co., 222 Mo. 173, 185, 121 S. W. 138, 24 L. R. A. (N. S.) 844, 17 Ann. Cas. 763, where it is declared, quoting from Mobile Life Ins. Co. v. Brame, 95 U. S. 754, 756, 24 L. Ed. 580:
>
> " 'The authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that

it is impossible to speak of it as a proposition open to question.'

"See also, 8 R. C. L., p. 719; § 15; 17 C. J., p. 1181, § 36.

"Some of the cases put it that the death of a human being could not be complained of in a civil court as an injury, or that no private action (as distinguished from a criminal prosecution) for wrongful death was maintainable, but whatever the form of expression used it is not to be doubted that the rule applied to actions ex contractu as well as actions ex delicto."

The Court further said that the doctrine in Missouri always has been that the wrongful death statutes confer a cause of action *ex delicto*, not one *ex contractu*.

The decision in the Bloss case was referred to with approval by the same court in Braun v. Riel, 40 S. W. (2d) 621, 622, 80 A. L. R. 875, 879. The Braun case, however, was construed to be an action ex delicto and not one ex contractu.

We respectfully submit that the foregoing decisions of the Supreme Court of Missouri are controlling in this case.

Petitioner relies upon London Guarantee & Accident Company, Ltd., of London, England, v. Strait Scale Company, 322 Mo. 502, 15 S. W. (2d) 766, 64 A. L. R. 936. An examination of the case will show that it does not militate against respondent's contention for two reasons; (1) While it is true the damages recovered by plaintiff included the loss sustained by its subrogor as a result of the death of an employe of the railroad company for which the subrogor constructed the coaling station, the point now before this Court was not raised by defendant nor decided by the Court; and, (2) the accident causing the death and the death itself occurred in the State of Minnesota, and an action for death arising from a breach of contract can be maintained under the death statute of

that state. The Minnesota statute in effect at the time of the accident and death involved in the London Guarantee & Accident Company case was Section 8175, Minnesota General Statutes 1913, Vol. 2, and provided:

> "When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission. * * *"

In Keiper v. Anderson et al., 138 Minn. 392, 165 N. W. 237, L. R. A. 1918 C 299, an action to recover for the death of plaintiff's husband, alleged to have resulted from illness contracted by him because of the failure of his landlord, the named defendant, to comply with the terms of a lease requiring the proper heating of a storeroom occupied by the deceased, the Supreme Court of Minnesota held that, under the provisions of the foregoing section, an action to recover for death resulting from a breach of contract could be maintained. We quote a portion of the opinion:

> "Defendants claim that the action will not lie because it is on contract, not in tort, and because the statutory action to recover for death caused by wrongful act or omission can be maintained only when the cause of action is in tort.
>
> "Had Keiper survived, his cause of action would have been for breach of the contract to heat the premises, as proof of the contract would have been necessary to create any cause of action. This is settled in this state. Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55; Sargent v. Mason, 101 Minn. 319, 112 N. W. 255; City of East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181, 45 L. R. A. (N. S.) 205, Ann. Cas. 1914 C, 720; Finch v. Bursheim, 122 Minn. 152, 142 N. W. 143; Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428, 1916 F, 1073.
>
> "It is just as true that the present action is based

on the contract; there could be no recovery except for the contract. Though negligence or wrongdoing be alleged, the action is founded on contract, and therefore classed as one, in substance, on the contract.

* * * * * * *

"Counsel for defendants insist that no action for death by wrongful act will lie unless the wrongful act or omission is a tort, negligence, unconnected with contract. They say that an act or omission is not wrongful—does not constitute negligence—unless it is a breach of some duty imposed by law, not merely one imposed by contract. They point out that the right of action given by the statute is a new and distinct right of action, not a survival of the right of action which the injured person had before his death to recover damages. This is correct under our decisions.

* * * * * * *

"We do not find support for the proposition of defendants' counsel that because the duty breached by defendants was one imposed by contract, this action will not lie."

It is evident from the above that the law of Missouri differs vitally from the law of Minnesota on the question involved in this proceeding, and that the London Guarantee and Accident case, in which the Missouri Supreme Court was ruling upon an accident and death which occurred in Minnesota, is not in point.

We submit that the opinion of the Circuit Court of Appeals in this case is not in conflict with the law of Missouri, but is in accordance therewith, and that consequently the petition should be denied.

Respectfully submitted,

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